No. 60.

IN THE

# UNITED STATES CIRCUIT COURT of APPEALS

— FOR THE —

## NINTH CIRCUIT.

SAMUEL COULTER,
*Plaintiff in Error*

*vs.*

JOHN A. STAFFORD,
*Defendant in Error.*

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON.

## BRIEF OF DEFENDANT IN ERROR.

BATTLE & SHIPLEY,
*Attorneys for Defendant in Error.*

ARMSTRONG & DE GUERRE, PRINTERS, 404 MONTGOMERY ST., S. F.

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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## Statement of the Case by Defendant in Error.

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In addition to the statement of the case made by Plaintiff in Error, we on behalf of Defendant in Error, submit the following as a further statement.

This was an action of ejectment by Plaintiff in Error, against Defendant in Error, to recover certain real estate situated in Seattle, King Co., Washington.

The cause was tried on June 4th, 1891, before the Honorable C. H. Hanford, United States District Judge, for the District of Washington—a jury trial having been waived, all questions of fact, as well as of law, were submitted to the Court for decision. On December 7, 1892, judgment was rendered in favor of defendant, (Printed Record, p. 64,) and on said date the Court also filed, together with said judgment, his Findings of Fact and Conclusions of Law, (Printed Record pp. 53–63 inclusive.)

No steps were taken by Plaintiff in Error to perfect his Bill of Exceptions in the case till June 3d, 1892, when the Bill of Exceptions printed in the Record on pages 70 to 80, both inclusive, were presented to the Court, and the Judge, over the objections of Defendant in Error, settled and signed the same, holding that all questions of the regularity of the said settlement of the Bill of Exceptions were matters to be passed upon by the Appellate Court.

Defendant in Error has filed in this cause a motion to strike out said Bill of Exceptions on the ground, that, in the settlement thereof, Plaintiff in Error did not comply with rules 26 and 55 of the Court, in which this cause was tried, which were then in force and regulated the practice in such proceedings, (Printed Record, p. 77).

A motion has also been filed in this cause by Defendant in Error to strike from the Transcript herein, certain original exhibits, which were

forwarded to this Court from the Court below in pursuance to an order signed by Judge Hanford, June 15, 1892, (Printed Record pp. 91, 92) it being contended by Defendant in Error, that, inasmuch as no Statement of Facts has ever been prepared or filed in this cause, that, for the purpose of this appeal, the said Findings of Fact, filed by Judge Hanford, (Record pp. 54-61) must be taken as the true and only facts to be considered by this honorable court.

For a more thorough and complete statement of the facts, involved in a consideration of the case upon its merits, reference is hereby made to the able opinion rendered by Judge Hanford, (Printed Record, pp. 43–53) reported in 48 Federal Reporter, 266, in which he quite thoroughly reviews the important questions involved. Defendant's title is based upon a tax deed and adverse possession thereunder, and the questions mainly to be considered in this brief are:

1st, The validity of the tax deed upon its face. 2d, Its inherent validity. 3d, The Statute of Limitation.

## ARGUMENT.

# Points of Law and Authorities.

### I.

### Bills of Exception must be Settled within Time prescribed by Rules and Practice.

This case was tried June 4th, 1891; judgment rendered December 7th, 1891, and Bill of Exceptions settled and filed June 3d, 1892.

Rule 26 of the Circuit Court for the District of Washington, among other things, provides that a party need not at the trial prepare his Bill of Exceptions, "but merely reduce such exceptions to writing, * * * and deliver the same to the judge. The bill or demurrer shall, within ten days after the termination of the trial, be drawn up, filed, and a copy served on the attorney of the adverse party," etc. * * * "In all cases where a party proposing a Bill of Exceptions fails to present his bill or bills and the proposed amendments to the judge for allowance or settlement, within the time limited as aforesaid, his Bill of Exceptions shall be deemed abandoned, and his rights thereto waived," (Printed Record, pp. 77–79). Rule 55, provides that the court may, in the interest of justice, and upon such terms as are just, allow any act to be done after the time prescribed by these rules, or may enlarge the time allowed therefor, (Printed Record, p. 79). None of the provisions of these rules were complied with by Plaintiff in Error in this case,

neither were any reasons given for such non-compliance, nor was an extension of time asked for or obtained, nor were said exceptions served upon the attorneys of Defendant in Error.

*The time within which exceptions may be drawn out and presented to the Court depends upon the rules and practice of the Court.*

*Sweet* vs. *Perkins*, 24 Fed., 777.

*Dredge* vs. *Forsythe*, 2 Black, 568.

In the case of *Muller* vs. *Ehlers*, 91, U. S. 249, the Supreme Court of the United States held the rule to be, that a bill of exceptions should be settled during the term, and in delivering the opinion of the court in that case, Chief Justice Waite says: "As early as *Walton* vs. *United States*, 9 Wheaton, 651, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This we think is the true rule." We respectfully submit, that, if merely as a matter of practice, the courts hold to the above rule, that, certainly, where the court has promulgated a rule, and given all parties notice, that failure to comply therewith will be held to be an abandonment of his Bill of Exceptions, it will not be held an immaterial matter.

In the case of *Herbert* vs. *Butler*, 14, Blachford 357, Benedict, Judge, says: "The order allowing a Bill of Exceptions, if granted would be a nullity, because the term, at which the trial was had, and the judgment rendered, was allowed to end

without any steps whatever being taken towards the allowance of a bill of exceptions, or to obtain an extension of time for that purpose."

To same effect see:

*Whalen* vs *Sheridan*, 18, Blachford 308.

*Libby* vs. *Crossley*, 40 Federal, 564.

*Marine City Stave Company* vs. *Herreshoff Manufacturing Co.*, 32 Federal, 822.

And cases cited in note:

In the recent edition of Foster's Federal Practice, (Vol. 2, second edition, published in 1892) the author treats of the subject of Bills of Exception, and in Section 377, lays down this rule, viz: "An exception must be noted when taken, *but, in the absence of a rule or order restricting or enlarging the time, may be signed at any time during the term*," citing in support thereof, the case of *Hunnicutt* vs. *Peyton*, 102, U. S. 333. The Supreme Court of the United States in a recent case holds that: "The manner or the time of taking proceedings as a foundation for the removal of a case by a writ of error from one Federal Court to another, is a matter to be regulated exclusively by acts of Congress," * * * "or from the rules of practice of the courts of the United States," and further in the same case in construing the rules of the Circuit Court of the United States for the Southern District of New York, which are quite similar to the aforesaid rules of the Circuit Court for the District of Washington, the Supreme Court says: "*The rules of the Circuit Court clearly contemplate proceedings to perfect a*

*Bill of Exceptions within the time limited, by those rules, without reference to the expiration of the term.*"

*Chicago Iron Co.*, petitioners, 128, U. S. 544.

Under the authorities above cited, we submit that there is no Bill of Exceptions, which can properly be considered on the hearing of the writ of error issued in this case, and that the judgment of the lower court should be affirmed.

II.

## Findings of Fact Conclusive.

Upon application of Plaintiff in Error, the Judge, of the District of Washington, who tried this case, signed an order allowing the original exhibits, filed on the trial hereof, to be sent up with the transcript to this court, (Printed Record, pp. 91, 92.)

On a trial of this cause a jury trial was waived by consent of both parties, and all questions of fact, as well as of law, were, by agreement of the respective attorneys, submitted to the determination of the court; the case was then tried by the court without a jury, and after the submission of the evidence on behalf of both parties hereto, (both oral and documentary,) the court found and filed herein its findings of fact and conclusions of law. (Printed Record, pp. 53, 64.)

No statement of facts, other or in addition to the findings of fact, so found by the court, has ever been prepared and filed in this case; and we

submit, that the said findings contain all the facts that can properly be considered by this court on the appeal hereof. Defendant in Error has filed a motion herein to strike from the transcript the original exhibits aforesaid, and on the grounds above set forth, we submit, that said motion should be granted, and this cause considered solely on the facts found by the said court.

The Plaintiff in Error seeks to question the correctness of some of the judge's said findings, which in the absence of any statement of facts can not be done. *The court's findings may be general or special, and have the same effect as the verdict of a jury.*

*Foster's Federal Practice, 2nd Ed. Vol. 2, p. 771.*

It has been held that *when the parties consent that the case be referred to the judge or referee, the only question presented by the writ of error is whether there is any error of law in the judgment upon the facts as found by the judge or referee.*

*Payne* vs. *Central Vermont R. R. Co.*, 118 U. S. 152.

Further, we find, that the Code of Washington, Section 247, (Code 1881) among other things, provides: The order of proceedings on a trial by the court shall be the same as provided in trials by jury. *The findings of the court upon the facts shall be deemed a verdict.* It is now admitted to be the rule that appellate courts will not disturb or reverse a verdict on questions as to

the weight of evidence, unless all the evidence adduced at the trial is before them for inspection.

Outside of said findings of fact, but one portion of the evidence submitted to the court on the trial hereof is included or attempted to be included in the transcript, viz: The documentary evidence in said exhibits, wherefore we respectfully contend that, on this appeal in considering questions of fact the said "findings of fact" must be conclusive.

## III.

## Argument on the Merits.

The land in controversy is part of a larger tract granted by the United States to Philip Ritz, by patent dated May 15th, 1869, and was subsequently duly conveyed to George Woodward by deed, dated September 20th, 1873; and George Woodward and wife duly conveyed the same to Albert Carr, by deed, dated October 27th, 1873; and Albert Carr, under the name of Alfred Carr, subsequently to the sale for taxes hereinafter mentioned, conveyed the same to John Burke by deed, dated June 26th, 1884; and John Burke conveyed the same to the Plaintiff in Error by deed, dated February 25th, 1888, all of which deeds were duly recorded in the Auditor's office of King County, Washington, (Findings of Fact, pp. 54, 55, Printed Record).

Said land was duly assessed and entered in the assessment roll of King County, Washington Territory as required by law, for the taxes of the year 1882, in the name of Albert Carr, as the owner thereof, and said land was upon the 7th day of May, 1883, sold by the sheriff of King County for the delinquent taxes of the year 1882, said sale

being in all respects in conformity with law, to one H. Jacobs, for a sum sufficient to pay the taxes so levied upon the same, the sale of the whole thereof being necessary (Findings of Fact, Record, pp. 55, 56). Upon the day of said sale the said sheriff duly executed and delivered to said Jacobs, a certificate of such purchase, which certificate of purchase in all particulars contained and set forth the facts and recitals required by law (6th Finding of Fact, Record, p. 56, 57).

A period of more than three years after said sale elapsed and no redemption was made or tendered of said property so sold, nor has any redemption or tender ever been made of said real estate; and long prior to the expiration of three years from the date of said sale, said Jacobs sold, assigned and delivered said certificate of purchase to defendant in error, who, as the owner and holder of said certificate, after the expiration of three years from the date thereof, surrendered the same to the then sheriff of King County, and paid and established to the satisfaction of said sheriff that he had fully paid all subsequent accrued taxes (7th and 8th Findings of Fact, Record. p. 57.)

The said sheriff did on the 14th day of July, 1886, by a deed of said date, make, execute and deliver to defendant in error, John A. Stafford, a tax deed for said land, which was duly signed, sealed and acknowledged by said sheriff, and in all particulars complied with and contained the requirements of the law; and wherein the *Territory of Washington is party of the first part* and defendant in error is the party of the second part; it is further found in said findings that said land is described in said deed as follows, to wit: *As being in the County of King, Territory of Was-*

*hington,* and particularly described as follows: Northeast quarter of Southwest quarter, Section 20, Township 25, north of range 4 east, containing two and 50-100 (2½) acres, and said court further found as a fact, that *said description is in all particulars is the same as the description thereof given in the assessment roll*, with the *sole exception* that the words "*North of*" preceding the word and figure "*range 4*," and the word "*east*" succeeding said word are not contained in the description of said land, as the same appears upon said assessment roll; and further found that said assessment roll contained the number of the road district.

The court also found as a fact, of which the court will take judicial knowledge, *that said King County is wholly north of the parallel and wholly east of the meridian* (Willamette Meridian, 9th Finding of Fact, Record, pp. 57–59).

All of the requirements of the law from the said assessment up to and inclusive of the execution of the said deed, were complied with in the said assessment, sale and the execution of said deed; and the same was duly recorded on the 17th day of July, 1886, in the office of the Auditor of King County, Washington (10th Finding of Fact, Record, p. 59).

At the time of making said sheriff's deed to Defendant in Error, said land was *wild*, *unoccupied*, *unimproved* and of *little value*, and Defendant in Error did upon the 1st day of October, 1886, under said deed, take *actual*, *quiet*, *peaceable and adverse* possession thereof, and during said year, 1886, enclosed and improved the same, and in the early part of the year 1887,

erected his residence thereon; and ever since said 1st day of October, 1886, has been in the *open*, *notorious*, *actual*, *quiet*, *peaceable*, *continuous*, *exclusive and adverse* possession of the land in controversy, *holding and claiming* under said deed *adversely* to the said *Plaintiff in Error*, his *grantor* and *all other persons*, for a *period* of *more* than *three years* next preceding the filing of plaintiff's complaint herein; and still holds said *exclusive, adverse and actual possession*, claiming the same *adverse to Plaintiff in Error*, and *all* others, and has *exclusively* paid all taxes levied and assessed thereon from said date of purchase by him, and *in good faith* and before the institution of this suit erected thereon permanent improvements of the value of $930 (11th Finding of Fact, Record, pp. 59, 60).

No suit, or proceeding whatever, by Plaintiff in Error, or any other person has ever been commenced for the recovery of said land within three years from the recording of said tax deed, nor has any such suit or proceeding been begun prior to the institution of this suit, viz: January 29th, 1891; nor has said land ever been redeemed or attempted to be redeemed from said tax sale (12th Finding of Fact, Record, p. 60).

The notice provided for in Sec. 1 of an act of the legislature of Washington, amending Sec. 2934 of the Code of 1881, which amendatory act provided for certain notice to be given by the holder of a tax certificate to entitle him to a deed, and which was approved February 3d, 1886, was not given by Defendant in Error. But the court found as a fact "*that the time intervening between the date of the passage of said act and the date of the expiration of three years from the day of the*

*sale*," * * * "*and the date of said certificate was not a sufficient or reasonable length of time to enable or require defendant to comply with the requirements thereof relative to giving such notice.*" No one was in the actual possession or occupancy of said land upon whom such notice could be served, nor was said Albert Carr in King County, so that such notice could be served upon him as in said act provided (13th Finding of Fact, Record, p. 61.

The first question to be considered is, do the foregoing findings of fact support the judgment in favor of Defendant in Error?

*When the findings are special, the review may extend to the determination of the sufficiency of the facts found.*

*Foster's Fed. Practice, 2 Ed. Vol. 2, Sec. 374.*

*And authorities cited.*

We submit that the aforesaid findings are complete and full, covering every detail and phase of the case and that said judgment based thereon must be affirmed, unless the record reveals some error in the admission of evidence fatal to some of the material findings; but if the contention of the Defendant in Error, be correct in arriving at a determination of the question as to the correctness of said findings, no evidence outside of the same can be considered in this court, owing to

the absence from the record of a Statement of Facts.

## IV.

## The Tax Deed Properly Admitted in Evidence.

Was said deed properly admitted in evidence upon the trial of this case?

As appears from the facts found by the court as hereinabove set forth, said deed was upon its face a valid tax deed, and both said certificate and deed contained all the recitals required by law.

The Code of Washington, (1881) Section 2936 provides as follows: "Sec. 2936. The matter recited in the certificate of sale must be recited in the deed, and such deed duly acknowledged or proved, is *prima facie* evidence that: (1) The property was assessed as required by law; (2.) The property was equalized as required by law; (3) The taxes were levied as required by law; (4.) The taxes were not paid; (5.) At a proper time and place the property was sold as required by law, and by the proper officer; (6.) The property was not redeemed; (7) The person who executed the deed was the proper officer." Section 2937 of said code of 1881, is as follows: "Such tax deed, duly acknowledged or proven is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive up to the execution of the deed."

Under these provisions of the law the burden of proof was on the plaintiff to show that some substantial pre-requisite of the law had not been complied with, anterior to the execution of said deed.

*Blackwell on Tax Titles*, 5th Ed., Vol. 2, Sec. 846.

Plaintiff in Error objected to the introduction of said deed on the ground that it was not a conveyance of said premises or any part thereof, and because the notice of redemption required by statute was not given; none of which matters appeared on the face of said deed, and we submit that the trial court did not commit error in admitting said deed over said objections.

## V.

## Description of said Assessment Roll Sufficient.

Plaintiff offered certain evidence to attempt to show a void assessment, the only point made against the validity of the assessment and sale being that the description of said property on said assessment roll did not contain the word "*north*" following the words township twenty-five, nor the word "*east*" after the words range four. The court found as a fact that said land was located in King County, Territory of Washington, and in addition that the number of the road district was included in said description; and further, that King County is wholly north

of the parallel and east of the meridian, which are the initials of the government surveys of all the land therein.

Under the authorities, no error can be found in the findings of the court that said assessment roll was perfect and valid unless it be that portion of said findings last above mentioned.

We submit it as a fundamental principle of law, that, *the courts will take judicial knowledge of the government system of survey;* and inasmuch as the court found as a fact that King County was wholly *north* of the parallel and *east* of the meridian, the omissions of said words *north* and *east* was immaterial.

*Hoyt* vs. *Russell*, 117, U. S., 404.

*Carson* vs. *Ralsback*, 3, Wash. Ter., 168.

*Atwater* vs. *Scheuks*, 9, Wis., 160.

*Mossman* vs. *Forrest*, 27, Ind., 233.

*Wright* vs. *Phillips*, 2, G. Greene, 191.

That this alleged objection did not appear upon the face of the deed, see Findings of Fact (Printed Record, p. 58).

## VI.

## Tax Deed Valid Notwithstanding Failure to Give Notice.

The law in force at the time of the aforesaid tax sale secured to the delinquent taxpayer, a

right to redeem his land at any time within a period of three years from the date of the sale and provided that in case of his failure to redeem within that time, the holder of the certificate of sale should be entitled to have a deed executed by the sheriff of the county which should have the effect to convey to him absolutely the title to the property. This land was not redeemed, and on the 14th day of July, 1886, which was more than three years after the sale, a deed was made by the sheriff to defendant, purporting to be a tax deed pursuant to the above mentioned sale to Mr. Jacobs. Before the right of the holder of the certificate to have a deed had matured by by lapse of the time allowed for redemption, section 2939 of the code (1881) which contains the provisions of law conferring upon the sheriff all the authority which he had to execute the deed, was amended by the addition of a proviso requiring the holder of the certificate to serve a notice upon the person in whose name the land was assessed, personally or by publication, if he be not found within the county, not less than sixty days prior to the expiration of the time for redemption, and to make proof of the giving of such notice in a prescribed manner before he should be entitled to receive a deed. This amendatory act is general in its terms, making no exceptions of cases in which the redemption period is about to expire. It repeals all conflicting statutes, and contains no saving clauses. The act was approved February 3d, 1886, and went into effect the same day. The 6th day of May, 1886, was the last day of the three years allowed for redemption of this property from the tax sale.

The time intervening between the approval of said act and the 6th day of May, 1886, upon which

last named date said period of redemption expired, was only 91 days. The court in his said findings of fact found as a fact that said period, considering the usual delay in the publication of laws after their enactment, did not afford a reasonable opportunity for compliance with the requirements of the new enactment, relative to giving notice (Finding of Fact No. 12, Printed Record, p. 61).

In addition to the authorities heretofore cited in this brief on the question of the sufficiency of the said findings of fact, and the extent to which the same may be properly reviewed in this court, we submit, that the law requiring notice to be given, passed subsequently to the purchase at a tax sale, and prior to the date upon which the purchaser is entitled to deed, need not be complied with unless the time intervening is reasonable and ample, and as to whether or not compliance with the law will permit of a reasonable or ample time, the question as to when the law was published so as to make the same known to the people will be taken in consideration.

As to necessity for a reasonable time being allowed see:

*State* vs. *Hunddhausen*, 24 Wis., 196.

*Curtis* vs. *Morrow*, Id. 669.

*Merklen* vs. *Blake*, 22 Wis., 500.

And cases cited:

*Where a statute is passed shortening the period of limitation, that statute applicable to a case*

*where a reasonable portion of the time limited remains after its passage.*

*Blackwell on Tax Titles*, 5 Ed., Vol. 2, Sections 946–678.

Further, we contend that the said finding of the court is conclusive on this point, especially in view of the additional finding that no one was in actual possession or occupancy of said land upon whom notice could be served, etc. (Printed Record, p. 61), consequently notice by publication must have been made three times, the first not more than five months, the last not less than sixty days prior to expiration of period of redemption; consequently the finding of the court that the intervening period of 91 days was not sufficient time to allow of a compliance with the requirements of the new law is supported by the facts in the case.

It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.

Cooley Constitutional Limitations, 5th edition, p. 455.

## VII.

## Purchaser has a Vested Right to a Deed.

The Supreme Court of Illinois in the case of *Bruce* vs. *Schuyler*, 9 Illinois (4th Gilman) 273,

holds that a tax sale is a contract, and that the same is within the constitutional prohibition that no State shall pass any law impairing the obligation of a contract.

The purchaser at a tax sale buys with reference to the laws in force at the time, and any law imposing any additional burdens or any new conditions to be performed by him subsequently thereto, is impairing the obligations of his contract, and is void.

*Nelson* vs. *Roundtree*, 23, Wis., 367.

*Robinson* vs. *Howe*, 13, Wis., 341.

"*The contract for a deed is made at the time of sale, and any law changing the terms of that contract is unconstitutional.*"

Blackwell on Tax Titles, 5 Ed., Vol. 2, Section 714.

In general, on the proposition that contracts are entered into with existing laws in view, and that the obligations thereunder assumed are measured according to their existing legal meaning, and hence any law which in its operation amounts to a denial or obstruction of the rights accruing by such contract though professing to act on the remedy only, are directly obnoxious to the constitutional prohibition, see:

*McCracken* vs. *Hayward*, 2 Howard, 612.

Cooley in his work on Constitutional Limitations, 5th Edition, p. 219, thus expresses the true rule of construction of statutes: "Acts of the legislature which literally interpreted would invalidate and destroy vested rights, are upheld by giving them prospective operations only."

"When a right has become vested, the legislature has no power to impose penalties or terms as a condition to the assertion of that right."

An act imposing such conditions, was construed to be prospective only in its operation.

Blackwell on Tax Titles, 5th Edition, Volume 2, Section 714.

*Conway* vs. *Cable*, 37 Ill., 82.

Under the foregoing authorities we respectfully submit:

1st. The legislature of Washington did not intend the said amendatory act of February 3d, 1886, to apply to sales of land for taxes made prior to the passage thereof; 2nd. If it was intended to so apply to the extent that it effects such prior sales said act is unconditional.

## VIII.

## The Statute of Limitations a Bar to this Action.

As appears from the facts found by the court as aforesaid, the Defendant in Error, Stafford,

went into possession of this land in 1901, enclosed the same with a fence, built the residence therein, and placed permanent and valuable improvements worth $700 on said premises in good faith, that at the time of his so taking possession thereof as aforesaid, the land was wild and of no value other and ever since the 1st day of October 1901, has been in the actual, continuous and adverse possession thereof under his said tax deed, which was recorded July 15th, 1907, Findings of Fact, Printed Record, pp. 10, 11).

It will also be seen that the deed under which Plaintiff in Error claims title was not executed till February 5 1906, nearly two years after Defendant in Error had redeemed his said tax deed and after the same had been duly recorded. Said deed of Defendant in Error was thus recorded for more than three years before this suit was begun. The land was sold for a tax which had not been paid, and it has not been redeemed. Section 3187 of the Code of 1881 of Washington provides that "Any suit or proceeding for the recovery of lands sold for taxes, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter, except by the purchaser at the tax sale."

If said deed is void on its face and when the case is duly within the said statute and barred by it, and Plaintiff in Error cannot thus be entitled to the possession of the estate of limitations. Defendant in Error need not prove the regularity of the assessment proceedings which preceded the tax sale, but had she done so the deed is void and entirely impotent to serve either as a conveyance of the title, or as a muniment to set the statute running."

In the case of *Pillow* vs. *Roberts*, reported in 13, Howard, 472, we find a full discussion of this identical question, the court holding that *if the deed had been insufficient as a proof of title, it ought to have been received in connection with proof of possession to establish a defense under the statute of limitations.*

Judge Hanford in his very able opinion filed in this case, quotes at considerable length from the opinion in said case above referred to.

That case is of especial importance, as the Supreme Court of the United States in announcing their opinion therein were not tramelled or controlled by any previous decisions of the Supreme Court of the State whence the case was appealed.

To hold that the owner of a tax deed, in order to take any benefit from the statute passed for his especial security, must first prove a perfect title is directly opposed to the theory of that class of legislation. Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring a suit and which, on his failure to do so, establish a legal presumption against him that he has no rights in the premises, such a statute is a statute of repose; and as Mr. Cooley in his work on Limitations, says: "The title to the property irrespective of the original right, is regarded in the law as vested in the possessor;" moreover, we submit that regardless of how this question might have been decided under statutes different from ours that so far as this case is concerned, the matter can no longer be in dispute, for the reason that the statute of limitations embraced

in said Section 2939, of the Code, is borrowed from Wisconsin. The two statutes are identical except that the last seven words of the Washington statute are not found in the Wisconsin act.

The Supreme Court of Wisconsin has in a long line of decisions held that the grantee in a tax deed is not required to establish the validility of his deed in order to maintain a plea of the statute in bar of an action to recover the possession of land, which decisions were approved of by the Supreme Court of the United States in the case of *Leffingwell* vs. *Warren*, 2 Black, 599.

In the opinion of the court in that case, Mr. Justice Swayne says: "*In Sprecker* vs. *Wakeley et al.*, 11 Wis., 432, the subject came again under consideration. The court reaffirmed the principles of the former decision. In answer to the objection that it should be shown that the land had been regularly sold, and that the officer who executed the deed had authority to give it, they say:

"But if this is a correct view of the statute we fail to perceive any object in passing it. For, when the public authorities have proceeded strictly according to law in listing the lands, assessing the tax, making demand for the same at the proper time and place, advertising for non-payment of tax, etc, and have observed all the requirements of the statutes up to the execution of the deed, surely the tax deed in that case must convey a good title, or our revenue laws are illusory, and the power of the government to raise means by taxation upon the property of its citizens necessary for its own support and action, is entirely impotent and vain. But we think a

party cannot be required to show that his tax deed has been regularly obtained before he claimed the protection of this statute, since such a construction renders the law unnecessary and useless."

* * * * * *

The lapse of time limited by such statutes not only barred the remedy but it extinguishes the right, and vests a perfect title in the adverse holder. "It tolls the entry of the person having the right, and consequently, though the very right be in the defendant he can not justify his ejecting the plaintiff."

*Defects in the proceedings prior to the deed do not prevent its being Color of Title.*

*Blackwell on Tax Titles*, 5th Ed., Vol. 2, Sec. 862.

To same effect see:

*Oconto County* vs. *Jerrard*, 46 Wis., 326.

*Edgerton* vs. *Bird*, 6 Wis., 597.

*Hill* vs. *Kricke*, id., 447.

*Sprecker* vs. *Wakeley*, 11 Wis., 432.

"*The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.*

*Leffingwell* vs. *Warren*, 2, Black, 603.

Said decisions are equally binding on the Federal Courts in this case, for the rule thus established by the Supreme Court is controlling authority herein; especially for the reason that the Legislature of Washington in adopting a statute of Wisconsin, also adopted the decisions of that State which had been made construing such statute at the same time.

But even though said deed were defective on its face, we contend that under our statute it would be Color of Title and would set the statute of limitations to running.

*Lindsay* vs. *Fay*, 25, Wis., 460.

*Edgerton* vs. *Bird*, id., 527.

*Dunn* vs. *Herrick*, 14, Ind., 242.

*Pugh* vs. *Youngblood*, 69, Ala., 298.

Therefore we respectfully submit, that, under the authorities above cited, no reason exists in law why defendant should be denied the benefit of the statute of limitations and that the judgment of the lower court ought to be affirmed.

## IX.

Plaintiff in Error in the main, bases his contention for a right of recovery in this case upon the said act of February 3d, 1886, amending Section 2934, Code of 1881, and the alleged non-compliance with the provisions thereof, in regard

to notice, by the Defendant in Error in securing his said deed.

Said act of February 3d, 1886, was repealed by the act of the Legislature of Washington, passed in March, 1890, entitled: An act to provide for the assessment and collection of taxes in the State of Washington.

Section 149 of said act, treats of the same subject that is contained in said act of 1886, and Section 154 of said act of 1890, repeals "all laws and parts of laws heretofore enacted upon any of the subjects in this act provided for."

The Plaintiff in Error can not now avail himself of any rights acquired by virtue of said act of February 3d, 1886.

## X

Plaintiff in Error asks that the judgment herein be reversed, and that this court enter judgment for him as prayed for in his complaint.

We contend that not having any Statement of Facts before it, this court would find nothing in the record upon which to base such a judgment.

Furthermore, defendant, in event of a reversal of the judgment of the lower court, would have the right to have this Honorable Court pass upon certain objections made by him at the trial, to the introduction of certain evidence upon

which plaintiff's title is based, and as there is no Statement of Facts, this can not be done on the present record now before this Honorable Court.

Wherefore, in consideration of the foregoing authorities, we respectfully submit that the judgment of the Circuit Court for the District of Washington should be affirmed.

BATTLE & SHIPLEY,
*Attorneys for Defendant in Error.*